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In The

Supreme Court of the United States

October Term, 1987

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, AND THE COACHELLA VALLEY WATER DISTRICT,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May potentially affected water users invoke the Administrative Procedure Act, 5 U.S.C. § 702, to overturn three decisions by the Secretary of the Interior to hold lands in trust for the benefit of three Indian Tribes, in light of Congress' express refusal in the Quiet Title Act, 28 U.S.C. § 2409a, to waive the sovereign immunuity of the United States in suits to adjudicate disputed title to "trust or restricted Indian lands" and the APA's express provision that it does not authorize suit if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"?

2. Does the intervention of the United States in *Arizona v. California,* an original action in this Court to adjudicate rights to water from the Colorado River, waive the United States' immunity to suit in a separate federal district court action challenging three decisions of the Secretary of the Interior to hold land in trust for the benefit of three Indian Tribes?

3. Does the McCarran Amendment, 43 U.S.C. § 666, subject the United States to suit in federal district court to determine the validity of decisions by the Secretary of the Interior concerning the proper location of the boundaries of three Indian Reservations when the adjudication of the tribal water rights is pending before this Court in an original action?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
A. *Background of Proceedings in the District Court*	1
B. *Treatment of the Boundaries in Arizona v. California*	5
REASONS FOR DENYING THE WRIT	7
I. THE NINTH CIRCUIT CORRECTLY APPLIED THE QUIET TITLE ACT'S INDIAN LANDS EXCEPTION TO MWD'S BOUNDARY CHALLENGE	9
A. *MWD's Action is Governed by the QTA*	11
B. *The Indian Lands Exception Applies*	15
C. *Conclusion*	18
II. THE DECISION BY THE COURT OF APPEALS IS CONSISTENT WITH ARIZONA v. CALIFORNIA	18
A. *The United States' Waiver of its Sovereign Immunity in an Original Action did not Authorize this Suit to Challenge the Trust Status of Reservation Lands*	18
B. *This Court did not Direct the Resolution of the Title Claims in the District Court*	24
III. THE McCARRAN AMENDMENT WAS NOT MEANT TO FURTHER THE ADJUDICATION OF ISSUES MERELY RELATED TO THE ADJUDICATION OF INDIAN WATER RIGHTS	25
IV. CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page(s)
Arizona v. California, 373 U.S. 546 (1963) (*Arizona v. California I*)	*passim*
Arizona v. California, 460 U.S. 605 (1983) (*Arizona v. California II*)	*passim*
Block v. North Dakota, 461 U.S. 273 (1983)	*passim*
California v. Rank, 293 F.2d 340 (9th Cir. 1961)	27
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	27
Dugan v. Rank, 372 U.S. 609 (1963)	26
Larson v. Domestic & Foreign Corporation, 337 U.S. 682 (1949)	19, 20
Minnesota v. United States, 305 U.S. 382 (1939)	16, 21
Newman v. United States, 504 F.Supp. 1176 (D. Ariz. 1981)	17
New Mexico v. Lane, 243 U.S. 53 (1917)	17
Spaeth v. United States, 757 F.2d 937 (8th Cir. 1985)	16, 17, 18
State of Florida v. U.S. Dept. of Interior, 768 F.2d 1248 (11th Cir. 1985)	13
United States v. Mottaz, 476 U.S. 834 (1986)	8, 9, 10, 14, 15, 18
United States v. Penn, 632 F.Supp. 691 (D.V.I. 1986)	21
United States v. Shaw, 309 U.S. 495 (1940)	19
United States v. Sherwood, 312 U.S. 584 (1941)	19
United States v. The Thekla, 266 U.S. 328 (1924)	20
United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940)	22, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Wildman v. United States, 827 F.2d 1306 (9th Cir. 1987) 15, 16, 22

STATUTES

Act of April 26, 1906, § 18, 34 Stat. 137 23
5 U.S.C. §§ 551-706 (Administrative Procedure Act) 4
5 U.S.C. § 702 10
5 U.S.C. § 706(2)(D) 3
25 U.S.C. § 176 14
28 U.S.C. § 1292(b) 3
28 U.S.C. § 2401a 10
28 U.S.C. § 2409a (Quiet Title Act) 4, 13
43 U.S.C. § 666 (McCarran Amendment) 4, 9
43 U.S.C. § 772 ..... 2, 14

LEGISLATIVE MATERIALS

S. Rep. 575, 92nd Cong., 1st Sess. 1 (1971) 13, 27

STATEMENT OF THE CASE

At issue in this case are portions of the boundaries of the Fort Mojave Indian Reservation, governed by the Fort Mojave Indian Tribe; the Colorado River Indian Reservation, governed by the Colorado River Indian Tribes; and the Fort Yuma Indian Reservation, governed by the Quechan Indian Tribe. On these three Reservations, the location of the boundaries determines whether the lands in question will be administered by the Secretary of the Interior as public lands or held in trust for the benefit of the Indian Tribes who inhabit and govern the Reservations.

The boundary issues were raised but left unresolved in the ongoing original action, *Arizona v. California*, 373 U.S. 564 (1963) (*Arizona v. California I*); 460 U.S. 605 (1983) (*Arizona v. California II*). Despite the relationship between this action and the proceedings in *Arizona v. California*, the present action, as the Ninth Circuit recognized, is not an ancillary proceeding that derives its jurisdiction from *Arizona v. California*. When this Court last considered the boundary issues, this litigation was pending and the Court referred to it as a possible forum for resolving the boundary issues. It was recognized, however, that jurisdictional and standing defenses lurked in the background. Those jurisdictional defenses have emerged as insurmountable barriers to petitioners' action.

A. Background of Proceedings in the District Court.

In their prayer for relief in the complaint below, the petitioners, the Metropolitan Water District of Southern California ("MWD") and the Coachella Valley Water

District (Coachella),[1] ask (1) that the three orders of the Secretary of the Interior determining the boundaries of the Reservations "be declared in error and void," (2) that the boundaries of the Reservations be determined and declared, and (3) for the issuance of an "injunction requiring the Secretary to set aside the [orders] at issue and prohibiting the use of Colorado River water on lands found to be outside the boundaries of the [Reservations]." *See* Second Amended Complaint at 21-23, ordered filed on October 31, 1983. In response to cross-motions for summary judgment regarding the disputed portion of the boundary of the Hay and Wood Reserve on the Fort Mojave Indian Reservation, the district court ordered that the Secretary's order was "void," App. at 26a.

The district court vacated the Secretary's order on two separate grounds. It found that the Secretary exceeded his statutory authority under the federal resurvey statute, 43 U.S.C. § 772, since in the district court's view, MWD's and Coachella's contractual rights to the delivery of water from the Colorado River entitled them to be treated as bona fide "claimants' adversely affected by the resurvey. App. at 20a. The district court also vacated the order on due process grounds, finding that because MWD and Coachella did not receive notice and a hearing before the Secretary issued his order, the order was void *ab initio*. App. at 23a. Finally, the court held,

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[1]Although named as defendants in the district court, the States of Arizona and California have joined in the petition asking the Court to review the decision of the Ninth Circuit holding that the suit is barred by the United States' immunity.

under 5 U.S.C. § 706(2)(D), that it was authorized to determine the boundary issue *de novo*. App. at 20a, 23a, 26a. The Tribes and the United States appealed pursuant to 28 U.S.C. § 1292(b), challenging the jurisdiction of the district court, the holding that the Secretary's order was void, and the decision by the district court that having vacated the Secretary's order, it would decide the boundary issue *de novo*.[2]

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[2]Although the district court's order related only to the Secretary's decision regarding the boundary of the Fort Mojave Reservation, the three Tribes jointly sought an interlocutory appeal and filed joint briefs in the Court of Appeals.

The Secretary's order at Fort Mojave, issued on June 3, 1974, directed a resurvey of the Hay and Wood portion of the Reservation. The order resolved a long-standing dispute within the Interior Department as to the correct location of the western boundary of the Reserve. The Secretary resolved the conflict by deciding that the correct location of the Reserve was according to the courses, distances and acreage calls in the legal description, making the Reserve the full 9,114.81 acres as stated in the 1870 Executive Order.

The boundary dispute at the Colorado River Indian Reservation involves interpretation of an Executive Order issued on May 15, 1876. The 1876 Executive Order modified the Reservation boundaries, which were originally established by the Act of March 3, 1865, 13 Stat. 541, 559, by describing one of the boundaries as the "west bank of the Colorado River." The dispute concerns whether the boundary along the west bank is a fixed line or a moving line subject to the rules of accretion and avulsion. On January 17, 1969, the Secretary, relying upon an opinion from the Solicitor, issued an order directing that approximately the northerly two-thirds of the disputed boundary was to follow a fixed line.

The Fort Yuma Reservation boundary dispute centers on interpretation of a cession agreement entered into between the Quechan Tribe and the United States and ratified by statute in 1894, 28 Stat. 332. The 1893 agreement provided for the al-

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In its *per curiam* decision, the Ninth Circuit addressed only the issue of whether the district court had jurisdiction. The court noted that the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), "does not waive immunity to any claims which are expressly or impliedly forbidden by any other statute that grants consent to suit." App. at 9a. The Court of Appeals concluded that the Quiet Title Act, 28 U.S.C. § 2409a ("QTA"), was such a statute and did not waive the immunity of the United States in a suit such as this in which "the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands." App. at 9a. The Circuit Court also noted "the additional jurisdictional problem of absence of a case or controversy." App. at 6a, n. 3. The court reasoned that the petitioners' water rights were not "threatened" in light of this Court's holding in *Arizona v. California II*, that the Secretary's orders standing alone were not sufficiently final to warrant an adjustment to the tribal allocations. *Id.* The Ninth Circuit also rejected the contention of the petitioners that the McCarran Amendment, 43 U.S.C. § 666, could be viewed as a waiver of the United States' sovereign immunity in litigation which, at most, addressed only a preliminary issue to the determination of the relative rights of cer-

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lotment of irrigable lands, the sale of surplus irrigable lands under certain prescribed conditions, the holding of the proceeds in trust for the Tribe and the opening of non-irrigable acres to settlement under the general laws of the United States. On December 20, 1978, the Secretary issued an order declaring the 1893 cession agreement and the 1894 ratifying statute of no effect, due to the failure of the United States to fulfill the conditions of the 1893 agreement.

tain of the competing claimants to water from the Colorado River. App. at 11a.

B. Treatment of the Boundaries in Arizona v. California

As petitioners so vigorously argue, the *raison d'etre* of this case is *Arizona v. California I*, and the efforts of the United States and the Tribes to obtain additional allocations for the lands now recognized by the Secretary as part of the Reservations. *See Arizona v. California II*, 460 U.S. at 636-41. The present case was filed in response to the now rejected recommendation of Special Master Tuttle in *Arizona v. California II* that in the absence of any challenge to the Secretary's orders, the Court should treat the boundaries as "finally determined" within the meaning of its 1964 decree and increase the tribal water allocations in recognition of the lands now treated as part of the Reservations.[3] *See* Memorandum and Report on Preliminary Issues of Special Master Elbert P. Tuttle (August 28, 1979), *Arizona v. California* (No. 8, Orig., October Term, 1978) at 44.

The instant litigation was the subject of considerable discussion before this Court in *Arizona v. California II*. As pointed out by petitioners, the controversies at Fort Mojave and Colorado River initially arose in *Arizona v. California I*, but the Court expressly declined to resolve the boundary issues. 373 U.S. at 601; *Decree*, 376 U.S. at

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[3]Article IV, D(5) of the 1964 Decree in *Arizona v. California I* made the allocations to the Tribes "subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S. at 345.

345. Subsequently, the Secretary's orders were issued and the Tribes and the United States moved this Court to increase the tribal water allocations to provide water for use on the lands now acknowledged by the Secretary to be part of the Reservations. *See, e.g.*, Motion of the United States For Modification of Decree and Supplementary Memorandum, *Arizona v. California* (No. 8, Orig., October Term, 1978). The Court appointed a special master to make recommendations on the issue. 439 U.S. 419, 436 (1979).

Consistent with their motions for modification, the United States and the Tribes urged Special Master Tuttle to accept the Secretary's orders as final for purposes of the 1964 Decree. MWD asked the Special Master to adjudicate the boundary issues. In response, Special Master Tuttle refused to review the disputed boundaries and decided that the reservation boundaries established by the Secretary's orders had been finally determined within the meaning of the Court's earlier decree. 460 U.S. at 636-37. Before the Supreme Court, the United States and the Tribes again contended that the Secretary's orders were sufficiently final to meet the terms of the Court's earlier decree. 460 U.S. at 634. MWD and Coachella insisted that the Special Master erred in refusing to adjudicate the boundary issues and advised the Court that it was "an appropriate, indeed, perhaps the only forum in which such claims might be resolved." Exceptions of the California Agencies to the Report of Special Master Elbert P. Tuttle; Brief of Said Parties in Support of Exception, May 1982 at 18 (*Arizona v. California*, No. 8 Orig.); *see also* 460 U.S. at 638. This Court rejected

Special Master Tuttle's recommendation to increase the tribal allocations to account for the boundary lands. The Court also rejected the request by MWD and others that it decide the boundaries issues, indicating its preference that "if at all possible," the boundary issues be resolved in the present case or elsewhere. 460 U.S. at 638.

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REASONS FOR DENYING THE WRIT

This case involves petitioners' request to have the district court compel the Secretary of the Interior, despite his considered opinion to the contrary, to treat the lands in question as public lands in which the affected Indian Tribes have absolutely no interest. Despite the connection between this case and *Arizona v. California*, the critical issue presented by the petition for review is whether the Ninth Circuit correctly held that Congress has not granted the lower courts jurisdiction to hear such matters.

Petitioners contend that MWD's and Coachella's status as contract holders entitled to the delivery of water from the Colorado River peremits them to challenge the tribal interests in these lands, even though parties claiming an interest in the land itself are admittedly foreclosed from such a challenge. In order to avoid the problems with this case, petitioners rely on the Court's obvious desire in *Arizona v. California* to avoid the resolution of the Reservation boundary disputes. In furtherance of their arguments, petitioners repeatedly mischaracterize this

case as a "partial" water adjudication and the relief which they seek as "limited."

But there should be no confusion about the far-reaching scope of relief sought by petitioners. Their complaint seeks an order which will effectively divest the Tribes of any interest in the questioned lands and compel the Secretary to administer such lands as public lands rather than Indian lands. The only issue presented by the decision of the Ninth Circuit is whether the United States has waived its immunity to suit in district court to adjudicate these matters. The Court of Appeals in its *per curiam* decision recognized the drastic remedy sought by the petitioners and was not confused by the petitioners' misleading statements about the limited nature of the litigation below.

In its decision, the Circuit Court correctly followed the guidance provided in *Block v. North Dakota*, 461 U.S. 273 (1983), and *United States v. Mottaz*, 476 U.S. 834 (1986), that the APA does not waive the immunity of the United States in lawsuits such as this which are foreclosed under the QTA. The QTA expressly provides that the United States is not subject to suits over questions of title to trust or restricted lands and the APA by its own terms cannot be used to avoid that limitation. Likewise, the Ninth Circuit was correct in holding that "An application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent by the Secretary to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation

boundaries." App. at 8(a). Finally, longstanding precedent demonstrates that the McCarran Amendment was never intended to subject the United States to a suit such as this which, at most, addresses a small portion of the complex issue of adjudicating water rights from the Colorado River.

In short, the decision below was correct in that the United States' immunity protects the critical tribal interests under assault here from suit. Accordingly, there is no reason to grant the writ in this case.

I. THE NINTH CIRCUIT CORRECTLY APPLIED THE QUIET TITLE ACT'S INDIAN LANDS EXCEPTION TO MWD'S BOUNDARY CHALLENGE.

The QTA expressly waives the United States' sovereign immunity in civil actions "to adjudicate a disputed title to real property in which the United States claims an interest," subject to certain exceptions. Excluded from the waiver are actions challenging title to lands claimed by the United States as "trust or restricted Indian lands" and actions to adjudicate water rights that might be brought under the McCarran Amendment, 43 U.S.C. § 666.

The Court has twice examined the QTA in recent years. *Block v. North Dakota, supra; United States v. Mottaz, supra.* In *Block*, the Court granted certiorari to resolve the issues of "whether Congress intended the QTA to provide the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property" and whether the QTA's 12-year statute of limitations applies to actions brought by states. 461 U.S. at 276-77. Both issues were resolved in the affirma-

tive. After an extensive review of the evolution and intent of the QTA, the Court held:

> [C]ongress intended the QTA to provide the *exclusive means* by which adverse claimants could challenge the United States title to real property.

461 U.S. at 286 (footnote omitted) (emphasis added). North Dakota could not circumvent the "carefully-crafted provisions of the QTA" by use of an "officers suit" or through the waiver of immunity found in the APA at 5 U.S.C. § 702. The Court summarized the relationship between the QTA and the APA as follows:

> That statute [5 U.S.C. § 702] waived federal sovereign immunity for suits against federal offers in which the plaintiff seeks relief other than money damages, but it specifically confers no 'authority to grant relief if any other statute that grants consent to suit expressly or *impliedly forbids* the relief which is sought.' The QTA is such an 'other statute, because, if a suit is untimely under the QTA, the QTA expressly 'forbids the relief' which would be sought under § 702.

461 U.S. at 286, n. 22 (emphasis added).

Three years later, in *United States v. Mottaz*, the Court once again granted certiorari to interpret the QTA. The Eighth Circuit had concluded that certain Indian allottees could avoid the QTA's 12-year statute of limitations by suing the United States under the general jurisdictional provisions of 28 U.S.C. § 2401(a). At issue were lands in the Chippewa National Forest which the allottees claimed should be held in trust for their benefit. In reversing the Court of Appeals, the Court reiterated its holding in *Block* that the QTA was the only method available to challenge the United States' title to real property.

The Court provided considerable guidance in interpreting two of the central provisions of the QTA: what constitutes a "civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest" and when does the exception for Indian lands apply. The Court first emphasized that it is the nature of the relief being sought, not its characterization by the plaintiff, that determines the applicability of the QTA. 476 U.S. at 842. On the issue of the Indian lands exception, the Court stated that it applies to "suit[s] by third parties challenging the United States' title to lands held in trust for Indians." *Id.*

> Thus, when the United States claims an interest in the real property based upon that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity.

476 U.S. at 843 (footnote omitted). The footnote to that statement further emphasized that the purpose of this exception which had been recommended by the Solicitor of the Department of the Interior was to protect and preserve Indian lands. 476 U.S. at 843, n. 6.

The result is that this Court has already addressed the meaning and intent of the QTA and the Ninth Circuit's decision is squarely consistent with the Court's interpretation.

A. MWD's Action is Governed by the QTA.

The Ninth Circuit was correct in holding that this suit cannot proceed under the APA in light of the restrictions in the QTA. The APA as noted by the Court in *Block* does not provide consent to suit where another statute consent-

ing to suit "expressly or impliedly" prohibits the relief sought. *Block, supra,* 461 U.S. at 286, n. 2.

The QTA applies to all civil actions seeking to "adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a. In this case, the district court was asked to determine the title to the disputed lands by ascertaining the location of the three questioned Reservation boundaries. The complaint seeks a "determination and declaration as to the proper boundaries" so as to reduce the size of the Indian Reservations. At Fort Mojave, the Reservation would be reduced by some 3,500 acres. *Arizona v. California II,* 460 U.S. at 632. At Fort Yuma, some 25,000 acres would be lost. *Id.* at 633. And at the Colorado Indian Reservation, some 4,400 acres of reservation lands would be severed. *Id.* at 631. Although petitioners' interest in these lands originates with the potential impact on the amounts of water available to satisfy MWD's and Coachella's contracts, this action nevertheless plainly seeks to adjudicate the Tribes' title.[4]

As the Court of Appeals recognized, the QTA applies even though MWD and Coachella were not suing to recover title in their own name. App. 9a-10a. Congress described the broad purpose of the QTA as "to permit the United States to be named as a party in a civil action brought

[4]In *Arizona v. California I,* this Court previously refused to award water rights for non-trust lands within the boundaries of the Fort Mojave Indian Reservation. *Decree,* 376 U.S. at 345. If petitioners' objective is to address issues related to the determination of the Tribes' water rights, they therefore must challenge the trust status or underlying title of the lands rather than the inclusion of the lands in the Reservation for jurisdictional purposes.

by *any* person to quiet title to land claimed by the United States." S. Rep. 575, 92nd Cong., 1st Sess. 1 (1971) (emphasis added). The concern at the time was to remove sovereign immunity as a barrier to "[s]uits to quiet title or remove a cloud on title" to lands claimed by the United States. S. Rep. 575, *supra* at 5. It would be inconsistent with this broad waiver to limit the QTA's applicability only to parties seeking to recover title in their own names.

Moreover, to read the QTA in such a manner would effectively nullify the retained immunity of the United States for lands claimed as "trust or restricted Indian lands." 28 U.S.C. § 2409a. The Eleventh Circuit recognized that consequence in *State of Florida v. U.S. Dept. of Interior,* 768 F.2d 1248 (11th Cir. 1985).

> Although technically the suit in the instant case is not one to quiet title, we conclude that Congress' decision to exempt Indian lands from the waiver of sovereign immunity impliedly forbids the relief sought here. By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes.

768 F.2d at 1254.[*] The court found that it would be "anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands." 768 F.2d at 1254-55.

Nor does it matter that, even if successful, this litigation would not result in a total divestment of the United States' title since the lands would become public lands managed by the Bureau of Land Management. The fact remains that the United States would be divested of its

title to these lands as Indian trust lands held for the exclusive use of the three Indian Tribes.

In *United States v. Mottaz*, this Court applied the QTA under similar circumstances. There, the plaintiff was an Indian allottee seeking to recover her allotment which was now part of Chippewa National Forest. Under her theory, the land had always been held in trust for her by the United States. Granting plaintiff's relief would not have divested the United States of its title since it would be Indian trust lands instead of National Forest lands. Yet, this Court looked to the QTA to define the extent to which the United States had waived its immunity to suit.[5]

The Ninth Circuit did not, as petitioners suggest, misconstrue the nature of this action. MWD and Coachella are attempting to interfere with the Secretary's responsibilities to resurvey the boundaries of the Reservations. Through federal statutes, 25 U.S.C. § 176 and 43 U.S.C. § 772, Congress has delegated to the Secretary the "discretion" to resurvey Indian Reservation boundaries, including the interpretation of relevant treaties and executive orders. (MWD concedes that it cannot

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[5]Contrary to petitioners' contentions, the Ninth Circuit's decision will not frustrate resolution of important federal-state-Indian jurisdictional issues. Pet. at 21-22. The jurisdictional cases cited by petitioners do not seek to determine the title to the lands held by the United States for the benefit of the affected tribes, but rather involve determination of reservation boundaries in order to ascertain the jurisdictional responsibilities of the interested tribes, states and the United States. Here, in contrast, the issue involves the title to the land. *See* n. 5, *supra*.

challenge this policy decision.) Petitioners' claim that this case only challenges "the Secretary's attempt to give the added lands a retroactive earlier water priority by 'reinterpreting' " the relevant executive orders, Pet. at 22-23, does not mitigate the interference with the Secretary's fiduciary responsibilities. No matter how vigorously petitioners claim that this case is a water allocation suit, the fact remains that tribal title to the land is at stake.

B. The Indian Lands Exception Applies.

The Ninth Circuit also correctly applied the Indian lands exception of the QTA to MWD's action. As interpreted by this Court, the exception retains the United States' immunity in actions "by third parties *challenging the United States' title to lands held in trust for Indians.*" *United States v. Mottaz, supra*, 476 U.S. at 842 (emphasis added). As stated by the Court, "when the United States *claims an interest* in the real property based upon that property's status as trust or restricted Indian lands," the QTA does not waive the Government's immunity. *Id.* at 843 (emphasis added). Plainly, the lands in question here are claimed by the United States "based upon their status as trust or restricted Indian lands." *Id.*[6] This fact justified the Court of Appeals' application of the QTA's Indian lands exception and the dismissal of this lawsuit.[7]

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[6]This is expressly acknowledged by MWD and Coachella in their Second Amended Complaint, ordered filed on October 31, 1983, at p. 4.

[7]The Ninth Circuit's reasoning is consistent with its earlier decision in *Wildman v. United States*, 827 F.2d 1306 (9th Cir.

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Petitioners argue that the Court of Appeals should have paid heed to the Eighth Circuit's interpretation of the Indian lands exception in *Spaeth v. United States*, 757 F.2d 937 (8th Cir. 1985), and required the United States to establish that its claim to the Indian lands is "substantial" before the QTA exception applies. 757 F.2d at 943. The *Spaeth* decision is factually distinguishable from the present action and should not be applied here. Moreover, its legal reasoning does not withstand scrutiny.

Prior to enactment of the QTA, sovereign immunity precluded jurisdiction over suits where the United States claimed an interest in lands as trustee for Indians. *See Minnesota v. United States*, 305 U.S. 382 (1939). In the Indian lands exception, Congress intended to continue this protection for Indian trust land. Nothing in the legislative history of the QTA indicates otherwise. *See Block v. North Dakota*, 461 U.S. at 280 (prior to the QTA, persons "asserting title to land *claimed* by the United States had only limited means of obtaining a resolution of the title dispute. . . .") (emphasis added). To require a substantial claim would defeat the very purpose of the Indian

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1987), which held that a "colorable claim" by the United States that the lands are Indian lands is sufficient to invoke the exception. The court in *Wildman* rejected the contention that the United States has the burden of showing that the claim is substantial:

> Nothing in the statute [the QTA] suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians . . . .

827 F.2d at 1309.

lands exception, *i.e.*, to preserve the United States' immunity in cases disputing the trust status of Indian land. If the United States must prove that its title claim is substantial before immunity applies, the immunity preserved is rendered nugatory.

The only authority cited in *Spaeth* requiring the United States' claim to be substantial is an Arizona district court case, *Newman v. United States*, 504 F.Supp. 1176 (D. Ariz. 1981). None of the cases relied upon by the court in *Newman* reached the issue of the substantiality of the United States' claim. Nor did these courts devise pretrial procedures for determining that issue. Indeed, prior to the QTA, even where the government's claim was based on a decision characterized as "purely arbitrary," the suit was nevertheless dismissed on sovereign immunity grounds. *New Mexico v. Lane*, 243 U.S. 53, 56 (1917), cited in *Newman v. United States*, 504 F.Supp. at 1179.

The Court of Appeals was further justified in not following *Spaeth*, given its unique factual situation which is not present here. *Spaeth* involved numerous challenges to land once held by individual Indian allottees. The non-Indian plaintiffs had been in possession of the disputed land for years, but their title was being threatened due to a drastic reversal in federal policy regarding the estates of some former allottees. After citing *Newman v. United States* for the requirement of substantiality, the Eighth Circuit concluded, "we note that our analysis of the jurisdictional issues is affected by the extremely unusual facts of this case." 757 F.2d at 945. In contrast, the plaintiffs here are assured by this Court's decision in *Arizona v. California II* of judicial review of the Secretary's decisions before their interests can be affected. Thus, unlike

Spaeth, there is no danger that unjustified Secretarial actions will injure parties with no judicial recourse.

As a result, the Court of Appeals was correct in disregarding *Spaeth*. In the present circumstances, there is no authority which warrants the imposition of the requirement that the United States demonstrate that it has a substantial claim to the lands in question prior to invoking its immunity.

C. Conclusion

The Ninth Circuit's decision demonstrates plainly that it well understood the teachings of this Court in *Mottaz* and *Block* regarding the interaction between the APA and the QTA and the application of those statutes to Indian lands. The unique factual circumstances of this case do not require a re-evaluation of the guidance previously provided by the Court. As a result, review of the Court of Appeals' decision is not warranted.

II. THE DECISION BY THE COURT OF APPEALS IS CONSISTENT WITH ARIZONA v. CALIFORNIA.

A. The United States' Waiver of its Sovereign Immunity in an Original Action did not Authorize this Suit to Challenge the Trust Status of Reservation Lands.

The petitioners also contend that the United States' assertion of reserved water rights in *Arizona v. California* subjects the United States to litigation in the district court challenging the right of the Secretary of the Interior to hold the disputed lands in trust for the three Tribes and to administer those lands as part of the Reservations. As

petitioners admit, Pet. at 15, this remarkable view has never been endorsed by any court.

Petitioners take this novel stance despite the assurances of the Court in *Arizona v. California II* that their ability to use water from the Colorado River will not be jeopardized without the Court's scrutiny of the underlying predicates for the award of additional water to the Tribes. As a result, this is not the usual situation in which sovereign immunity is questioned because it leaves an aggrieved entity without a forum in which to obtain relief. To the contrary, petitioners' interests are completely protected by the existing decree in *Arizona v. California* and will not be affected in the absence of review in this Court or elsewhere. At any rate, there is no justification for petitioners' strained argument that the Court of Appeals erred in failing to find that the United States waived its immunity to suit in district court by intervening in *Arizona v. California*.

The rules governing waiver of sovereign immunity are well-established. The United States is immune from suit unless Congress has waived such immunity. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Shaw*, 309 U.S. 495, 500-02 (1940). "[T]he terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, *supra*, 312 U.S. 584, 586. "Ever when suits are authorized they must be brought only in designated courts." *United States v. Shaw*, *supra*, 309 U.S. 495, 501; *see generally Block v. North Dakota*, *supra*, 461 U.S. at 284-85.

The Court's perspective on sovereign immunity in *Larson v. Domestic & Foreign Corporation*, 337 U.S. 682,

704 (1949), is noteworthy. *Larson* involved a suit against the head of the War Assets Administration to prohibit the sale of coal by the administrator to anyone but the plaintiff. The Court stated:

> There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief
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> . . . .
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> There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions.

337 U.S. at 704. Here, the rights of the petitioners are amply protected from interference by this Court's Decree in *Arizona v. California*. Before the tribal rights can be increased, the question of whether the Secretary's orders warrant the award of an early priority date for the affected lands must be addressed by this Court. Petitioners' rights, therefore, "are protected against governmental action" and no need exists for the Secretary to be "stopped in [his] tracks" from administering the lands in question in furtherance of his trust responsibilities.

In support of their novel argument, petitioners cite *United States v. The Thekla*, 266 U.S. 328 (1924), and

Minnesota v. United States, supra[8] in a feeble effort to draw an analogy between their action and a permissive counterclaim. Those cases stand for the narrow proposition that when the United States initiates a lawsuit, defendants may seek recoupment or setoff against the Government, so long as the claim relates to the subject matter. But as noted in *United States v. Penn*, 632 F. Supp. 691, 693 (D.V.I. 1986), cited by petitioners, the relief sought cannot "exceed" or be "different in kind" than that sought by the United States.[9]

In this case, the relief petitioners seek is considerably different than the water rights at stake in *Arizona v. California*. In *Arizona v. California*, the validity of the Secretary's decision, in effect, determines whether the United States is entitled to additional water rights for use by the

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[8]The citation to *Minnesota v. United States, supra*, is particularly surprising. There the Court held that where a state court lacks jurisdiction, removal to federal court will not cure that defect even if the federal court otherwise would have jurisdiction. The Court stated:

> And it rests with Congress to determine not only whether the United States may sue, *but in what courts the suit may be brought* . . . . Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States.

Id. at 388-89 (citations omitted) (emphasis added). The thrust of petitioners' argument is that by intervening in *Arizona v. California*, the Solicitor General conveyed authority to the district court to adjudicate the issues in this case.

[9]Of course, this action is not a counterclaim. The United States intervened as a plaintiff in *Arizona v. California*, an entirely separate cause of action. Assuming *arguendo* that that intervention constituted a waiver of immunity, then the adjudication of issues in *Arizona v. California* is not barred.

Tribes with the same priority date as the adjacent Reservation lands. Thus, the concern of the petitioners is that water rights for the disputed lands not receive the early priority date. If the United States and the Tribes are unsuccessful, and petitioners succeed, the result would be that petitioner's water rights would be unaffected. Here, the petitioners affirmatively seek to preclude the Secretary of the Interior from administering the lands as trust lands held for the benefit of the Tribes—a much different result.[10]

In these circumstances, *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940) provides useful guidance. In that case, the Court refused to permit a cross-claim in the Missouri courts against the Choc-

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[10]Notably, the lands in question are of considerable importance to the Tribes, whatever the status of the accompanying water rights. For example, at Colorado River the lands in dispute are adjacent to the River and are valuable for recreational and other purposes. The United States has already obtained final judgments quieting title in the Tribes for various parcels considered as part of the Reservation under the Secretary's order. *Arizona v. California II, supra,* 460 U.S. at 631.

As noted by the Ninth Circuit in *Wildman v. United States* involving Fort Mojave reservation lands:

> The 52.5 million acres held in trust by the United States for the Indians are the tribes' 'single most important economic resource.' F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 471. The interests held by the tribes as cestuis que trust are 'a unique form of property right in the American legal system, shaped by the federal trust over tribal land and statutory restraints against alienation.' *Id.* at 472. The land is the essential base of tribal culture, development, and society. *Id.* at 509. As trustee, the United States properly acts with the jealousy of a fiduciary to protect this base.

823 F.2d at 1309.

taw and Chickasaw Nations. By statute, Congress had allowed cross-suits against the Indian Nations, but only in "any United States court in the Indian Territory." Act of April 26, 1906, § 18, 34 Stat. 137, 144, 148. Even though the United States brought suit against the defendants in Missouri, the Court refused to allow the cross-claim in excess of the original claim in that court. The Court's reasoning is equally applicable here:

> The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.
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> It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.

United States v. United States Fidelity and Guaranty Co., supra, 309 U.S. at 506.

In conclusion, no precedent exists for the concept that when the United States enters into litigation in one forum, it waives its immunity to suit in other forums on related issues. Indeed, *United States v. United States Fidelity and Guaranty Co.* suggests precisely the opposite result.

B. This Court did not Direct the Resolution of the Title Claims in the District Court.

Petitioners also argue strenuously that this Court in *Arizona v. California II* directed the adjudication of the so-called boundary issues in the district court. Pet. at 17-18. The Tribes do not read the statement quoted from *Arizona v. California II*, 460 U.S. at 639, to mandate such a result in the absence of an adequate jurisdictional basis in the district court. As we read the Court's statement—contrary to petitioners' assertions—it was not meant to resolve the then-outstanding issues over the jurisdiction of the district court in this case. The statement was in response to the urgings of MWD and others that the Court decide the boundary issues and indicated the Court's preference for judicial review of the boundary claims in the district court or elsewhere. The Court, however, expressly acknowledged that it would revisit the question of whether it should address the boundary issues "if any of these grounds for dismissal are sustained." *Arizona v. California II*, 460 U.S. at 638.[11]

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[11]Petitioners also refer to the statements of Mr. Claiborne appearing for the United States in *Arizona v. California II* that he "disowned" the then pending motion to dismiss this case in the district court, claiming that the statement was an abandonment of the United States' jurisdictional defenses in this litigation. The extract quoted by the petitioners and the gloss which they ascribe to it, is misleading. Plainly, the Court did not understand Mr. Claiborne to say that the United States was abandoning its jurisdictional defenses in this case, but rather understood that he was merely indicating that he had not filed the motion to dismiss in this case. The full text of Mr. Claiborne's response, as well as the dialogue following indicate clearly that the Government would pursue its defenses in this

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The statement does not—and could not—waive the United States' immunity in this action. Instead, the more appropriate reading of that language, in our view, is that the Court would not consider the boundary issues in *Arizona v. California II* until the district court litigation was resolved. The holding below may delay the resolution of the boundary issues in *Arizona v. California II*, but that unfortunate result cannot confer jurisdiction on the district court.

III. THE McCARRAN AMENDMENT WAS NOT MEANT TO FURTHER THE ADJUDICATION OF ISSUES MERELY RELATED TO THE ADJUDICATION OF INDIAN WATER RIGHTS.

The petitioners also seek solace in the McCarran Amendment, claiming that the so-called partial adjudication which they seek is consistent with the intent of Con-

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case. See Transcript of Oral Argument at p. 62 (December 8, 1982), *Arizona v. California II*:

> Mr. CLAIBORNE: I hope I do not have to—I disown the motion to dismiss which has been filed by the United States in the district court. Whether that—all of those defenses or some of them will prevail in that court is something which—
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> QUESTION: Well, suppose they had prevailed. Would you still take the same position here?
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> MR. CLAIBORNE: Yes, we would. And—we would, assuming that that decision had survived appeal or had not been appealed, and had sustained our motion to dismiss, we would rest on the correctness of that ruling, and there is much law to the effect that—

The Court's opinion also demonstrates that it did not believe that the United States was withdrawing its objections to the lower court litigation. See, e.g., 460 U.S. at 678.

gress in passing that legislation. Longstanding precedent is to the contrary. As the Court of Appeals properly recognized, "[t]he McCarran Amendment . . . does not authorize private suits to decide priorities between the United States and particular claimants, only suits to adjudicate the rights of all claimants on a stream, *Dugan v. Rank*, 372 U.S. 609, 617-618 (1963)." App. at 11a.

Absolutely nothing in the language or the history of the McCarran Amendment suggests an intent to waive the immunity of the United States in instances in which litigants claim that the issues to be confronted by the court relate to the determination of water rights. Even when viewed most favorably toward the petitioners, this case "is a private suit to determine water rights solely between the [petitioners] and the United States . . . all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established. . . ." *Dugan v. Rank, supra*, 372 U.S. 618-619. Certainly, this case cannot be said to resolve the outstanding issue of the nature and scope of the tribal water rights associated with the disputed lands. In fact, it would be impossible for the lower court to address that issue, since the question remains before this Court in the exercise of its original jurisdiction in *Arizona v. California*. The result is that the McCarran Amendment cannot be read to permit suit to be brought against the United States in these circumstances.

That conclusion does not thwart the purposes of the McCarran Amendment which was intended to eliminate the immunity of the United States as a barrier to the determination of water rights in what were otherwise all-en-

compassing water adjudications. *See* S.Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951), quoted in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 810-11 (1976); *see also California v. Rank*, 293 F.2d 340, 347-48 (9th Cir. 1961), *aff'd Dugan v. Rank, supra*. Dismissal here does not foreclose the full adjudication of the water rights held by the United States for the benefit of the Tribes, because those rights are squarely before the Court in *Arizona v. California*. Stated simply, the McCarran Amendment is not implicated by this litigation.

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IV. CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated this 17th day of March, 1988.

Respectfully submitted,

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